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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted]

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York (R. 285 to 295), dated and filed July 7, 1961, is reported at 10 N. Y. 2d 218. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department (R. 265 to 282), dated and filed July 6, 1960, is reported at 11 App. Div. 2d 177, 202 N. Y. S. 2d 692. The oral decision *per* Justice Greenberg, in the Su-

preme Court of the State of New York, New York County granting a permanent injunction (R. 250 to 256), dated and filed May 25, 1960, has not been officially reported. The oral decision *per* Justice Greenberg denying defendants' cross motion to dismiss the complaint (R. 70 to 72), dated and filed May 19, 1960, has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on July 7, 1961 (R. 296). The petition for a writ of certiorari was filed October 3, 1961 and was granted (R. 300) December 4, 1961. The jurisdiction of this court is invoked under 28 U. S. C. §1257(3).

QUESTIONS PRESENTED

1. Whether the state court erred in applying the rule enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that "when an activity is arguably subject to §7 or §8 of the Act [The Labor Management Relations Act, as amended] the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . ." (*id.* at 245), where the issue here is a question of law, on facts not in dispute, as to whether the Act applies at all to foreign owned, foreign registered vessels flying foreign flags, manned by foreign crews serving under foreign articles entered abroad, the ships having come temporarily into American waters?

2. Whether the reach of the Labor Management Relations Act, as amended, extends to foreign owned, foreign

registered ships flying foreign flags and their foreign seamen working under foreign seamen's articles entered abroad, the ships having come temporarily into American waters; and whether the Act thus deprives state courts of jurisdiction over an action in tort seeking injunctive relief and damages against an American seamen's union from picketing or urging or inducing crew members to desert and to refuse to perform their duties in violation of their seamen's articles and the orders of the Master?

STATUTE AND TREATY INVOLVED

Petitioner contends that the jurisdictional scope of the Labor Management Relations Act (Taft-Hartley Act),[1] as amended (hereinafter referred to as "LMRA" and cited to the United States Code only), does not extend to the foreign ships here involved. The answer to this question cannot be resolved by reference to any particular section of the Act. To illustrate this, 29 U. S. C. §§141, 151 and 152(2), (3), (5), (6), (7) and (9) are reprinted in Appendix A, *infra*, pp. 49 to 53.

Reprinted in Appendix A, *infra*, p. 49, is Article XV of the Treaty of Friendship, Commerce and Navigation with the Republic of Liberia, August 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939).

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[1] 61 Stat. 137 (1947), 29 U. S. C. §§141-187, (1958), amending the National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 73 Stat. 519 (1959).

STATEMENT

The Parties

Petitioner (plaintiff below), Ineres Steamship Company, Ltd. (hereinafter called "Ineres"), is a Liberian corporation (Par. 1 of Complaint, R. 5; Pl. Ex. 1, R. 237, 37; Pl. Ex. 2, R. 239, 39; R. 37, 38, 41-42), owned by Italian nationals residing in Italy, with its principal office in London (R. 51). Its president is an Italian citizen, Vincenzo Berlingeri (R. 51), who does not own any of its stock (R. 52). Ineres owns and operates the ocean going passenger cruise vessels, SS NASSAU and MV VICTORIA (Pl. Ex. 1, R. 237, 37; Pl. Ex. 2, R. 239, 39; R. 37, 51; Wolfson Affid., R. 12, 13).

Respondent (defendant below), the International Maritime Workers Union (hereinafter called "IMWU"), is an American labor organization (Par. 12 of the Amended Answer, R. 30-31; R. 205) formed in November, 1959 (R. 190) by two American maritime unions—National Maritime Union and Seafarers International Union (R. 190)—for the "stated objectives" of organizing and representing alien seamen working on foreign flag vessels (R. 198-199). Respondent (defendant below), Shannon J. Wall, is both principal officer of IMWU and an officer of the National Maritime Union (R. 190-191). None of the other defendants were served, nor did any make an appearance.

The Foreign Vessels and Crews

Both vessels are registered under the laws of Liberia and fly the Liberian flag (Par. 6 of Complaint, R. 6-7; Pl. Ex. 1, R. 237, 37; Pl. Ex. 2, R. 239, 39; R. 37, 39, 40, 51, 63). The vessels have Monrovia, Liberia as their registered home

port (Pl. Ex. 1, R. 237, 37; Pl. Ex. 2, R. 239, 39).[2] Neither has ever been under the American flag (R. 38-40). The vessels are inspected by the Liberian Government for compliance with the International Convention For Safety Of Life At Sea (R. 50). The Liberian Government does not restrict the trade of these vessels except that trade with communist countries is forbidden (R. 42). The officers of the ships are required to be licensed by Liberia, and the ships are issued Liberian radio station licenses (R. 37, 51).

The vessels are foreign owned and foreign controlled (Opinion of Sup. Ct., R. 251). The vessels are at present engaged in the passenger cruise trade between New York and various Caribbean and South American ports (Par. 5 of Complaint, R. 6; R. 64). However, not all cruises originate in a United States port (R. 120). Cruises are made each year to Italy (R. 64) where the vessels undergo repairs and the crews take their leaves (R. 67). Occasionally, around the world cruises are made (R. 42).

The crews of the vessels are non-resident aliens, almost all of whom are Italian (Par. 8 of Complaint, R. 7; R. 60, 63-64, 105). They are recruited and hired in Genoa (R. 55-56, 105) under a wage agreement for the duration of the voyage and the season (R. 56). They sign Liberian articles in Genoa (R. 56, 118) in the presence of a Liberian consul (Df. Ex. C, R. 245, 116; R. 118, 185). The articles provide, *inter alia*, that "the terms of employment of the Master and the rest of the crew are governed by the laws of the Republic of Liberia . . ." and also that crew members ". . . shall

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[2] The Appellate Division found that Genoa, Italy, was the "de facto" home port of the two vessels (R. 269). Petitioner accepts this finding.

be ready to sail for any voyage and any destination whatsoever, at any time, whenever they shall receive orders to such effect from the Master of the ship or whomsoever replaces him" (Df. Ex. C, R. 245, 116). The articles incorporate by reference a more detailed underlying contract governing wages, terms and conditions of employment (Pl. Ex. 4 [not printed in the Record], R. 185; R. 56, 156-7, 185). Provisions in this contract obligate each crew member, *inter alia*, to obey the orders of his superior, to return to the ship not later than two hours before sailing and to give notice of intention to terminate his employment at least 48 hours before arrival or departure of the vessel in port (R. 186-187).

Union Activities

Wall testified that a factor in the course of action taken against Incres was the IMWU's belief that the operation of the NASSAU and VICTORIA deprived American seamen of job opportunities (R. 194, 201). Wall testified that if Incres were out of business, then American companies would probably have two more vessels operating on the route served by Incres (R. 217, 218). In other words, it would be to the advantage of IMWU, if Incres were out of business and if there were no other ships but American ships (R. 218).

In February 1960, IMWU initiated a campaign to organize crew members of the NASSAU and VICTORIA (R. 201).

On May 13, 1960, shortly after docking at pier 42, North River, New York City, the NASSAU—scheduled to depart on another cruise that same day—was met by an IMWU picket line (R. 141, 142, 158-159; Df. Exs. D and D-1 [not printed

in Record], R. 159). As a result of this picketing, longshoremen refused to load baggage, cargo and provisions on the NASSAU (Par. 12 of Complaint, R. 8; Wolfson Affid., R. 14; R. 142, 143, 144). Moreover, some crew members on the NASSAU, at the instigation of IMWU representatives on the dock, thereupon refused to obey orders to perform certain duties (Vagliasindi Affid., R. 16, 17; R. 141, 143, 177).

Later that same day, IMWU representatives from positions on the dock and on board the vessel caused about 100 crew members, without permission and in disobedience of their seamen's articles, to walk off the NASSAU approximately one hour before the vessel's scheduled departure (Pars. 11 and 13 of Complaint, R. 8; Wolfson Affid., R. 14; R. 142). These crew members refused to obey the order of the Captain that they return to the ship (Vagliasindi Affid., R. 17; R. 145). The NASSAU was left helpless and immobile at its berth, making it necessary to cancel the scheduled voyage (Pars. 15 and 22 of Complaint, R. 8-9, 10; Wolfson Affid., R. 14; Vagliasindi Affid., R. 17; R. 146, 147, 170).

Two days later, on May 15, the IMWU took direct action against petitioner's other vessel, the VICTORIA, returning from a cruise to South America (R. 93, 94). That day, pier 42, where the VICTORIA had been scheduled to dock (R. 93, 173), was occupied by the NASSAU, then still unable to sail (R. 173). Since other docking facilities could not be obtained for the VICTORIA (R. 173), it was necessary to disembark its passengers by tug boats while the vessel lay at anchor in New York Harbor (R. 93). As passengers were being brought ashore, IMWU representatives in a small launch marked "UMD-2" approached and boarded the tug boats

(R. 93, 94). Immediately thereafter the tug boats ceased disembarking passengers and left the vicinity of the vessel (R. 94-95, 105-106). Later that same day, following the intervention of police officials, the tug boats resumed operations (R. 95).

The next day, May 16, the IMWU was served with a temporary restraining order which enjoined the union from picketing petitioner's vessels or urging or encouraging crew members not to work on those vessels (R. 4-5). On the following day, May 17, early in the afternoon, passengers were being embarked by means of launches on the VICTORIA, which remained at anchor (R. 96). The vessel, scheduled to sail later that day (R. 96), was again approached by the launch UMD-2 (R. 74). Then, despite the restraining order, as the UMD-2 hovered near the vessel, IMWU representatives on board the launch urged the crew with a loudspeaker (R. 74, 136) not to sail (R. 74, 75, 86-87, 96, 97, 106-108). At the time, union representatives told crew members to feign illness and demand medical assistance as a means to prevent the ship from sailing (R. 75-76, 96-97, 107-108). This activity continued for approximately 40 minutes (R. 137).

A few hours later, when all of the pasesngers were on board and the VICTORIA was ready to sail as scheduled (R. 98), the members of the engine room department refused to run the engines (R. 98-99, 100-102, 125-126, 128). Representatives of the crew informed the Captain that they wished to confer with "the Union" (R. 102, 126). Because of this refusal, the ship could not sail (R. 98, 128).

On the following day, the Captain of the VICTORIA permitted representatives of the crew to go ashore and meet

with IMWU representatives (R. 102). Following this meeting, the crew members on shore contacted by radio telephone crew members remaining on the vessel and confirmed that the VICTORIA was not to sail (R. 103-104, 128). Thereupon the cruise was canceled and the passengers disembarked (R. 104).

As a result of the picketing and other acts of interference by the IMWU, neither the NASSAU nor the VICTORIA was able to resume its normal operations until after the decision of the Supreme Court of New York (R. 250-256) granting a permanent injunction against the picketing and other acts of interference.

Incres Line Agency, Inc. and Cosmopolitan Shipping Corporation

Incres employs the services of Incres Line Agency, Inc., a New York corporation with offices at 39 Broadway, as an agent to take care of the booking and arrival and departure arrangements of passengers in the United States (R. 52, 53, 55).[3] It provides the usual services of a steamship agency (R. 52, 55). Incres Line Agency, Inc. accounts to Incres for the sale of passenger tickets (R. 56) and takes care of the necessary provisioning of the ships in the United States (R. 55). Wolfson, president of the agency, may authorize repairs either after discussion with the president of Incres or occasionally with someone else (R. 57). Aside from the agency agreement itself (produced at the trial but not put in evidence, see Fols. 487-489 of original Record on Appeal [not reprinted]), the only connection between Incres and the New York agency is that the president of

[3] It also employs H. Curley & Fink as an agent with similar responsibilities in Nassau, British West Indies (R. 52, 53, 57).

Incres, Berlingeri, is also an unpaid officer and director of Incres Line Agency, Inc. (R. 59). He resides part of the time in New York and is provided office space at Incres Line Agency, Inc., 39 Broadway, when he is present in New York (R. 52, 57).

When in New York, Berlingeri visits the ships and checks on their general condition (R. 53), and he may authorize repairs (R. 57). He may discuss with the crews their personal or family problems, but his discussions do not include such matters as promotion or demotion (R. 53). Although it is not the rule of the company that the captains report to Berlingeri, they might on occasion do so with respect to incidents occurring on board ship (R. 54). He sometimes contacts the ships' husband in New York, Cosmopolitan Shipping Co. (R. 175). He is generally concerned with the operation of the ships when in New York, but testified that it is incorrect to say that the operations of the two vessels are conducted under his supervision from the office at 39 Broadway, because the agency there is primarily concerned with the arrival, departure and booking of passengers and with provisions (R. 52, 53).

Because Incres gives business to Incres Line Agency, Inc., Berlingeri is in a limited sense Wolfson's superior, and may on occasion give him directions (R. 57, 58).

Cosmopolitan Shipping Corporation with offices at 42 Broadway, New York City (R. 61) acts as ships' husband when the ships come into New York (R. 172), takes care of fueling (R. 58), loading, docking and disembarkation of passengers and hires linesmen, tugboats, and pilots (R. 172, 175). Cosmopolitan was engaged by Incres Line

Agency, Inc. on behalf of Incres to provide the above services for the NASSAU and VICTORIA (R. 172). Cosmopolitan provides these services for other steamship lines as well as Incres (R. 172).

The Litigation

Incres commenced the present tort action for damages and injunctive relief in the Supreme Court of the State of New York, New York County, on May 16, 1960, by service on that date of a summons and complaint, a temporary restraining order and an order to show cause why a permanent injunction against defendants' activities should not issue, signed by Justice Greenberg. A hearing pursuant to said order to show cause commenced May 18, 1960.[4] The hearing continued over a four day period. The order and judgment of the Supreme Court of New York (Greenberg, J.) denied defendants' motion to dismiss the complaint, permanently enjoined defendants, and severed plaintiff's damage claim for trial in regular course. Defendants appealed to the Appellate Division, First Department, which by a three to two decision modified and affirmed the order and judgment below. Defendants appealed, and by a four to three decision the Court of Appeals reversed the order and judgment of the Appellate Division and dismissed the complaint.

The petition for a writ of certiorari was filed October 3, 1961 and was granted December 4, 1961.

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[4] During the course of the hearing counsel for the parties stipulated that the hearing be treated as a hearing for a permanent injunction.

SUMMARY OF ARGUMENT

The state court erred in applying the "arguably subject" pre-emption rule of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959) and deciding that "at least until the board refuses jurisdiction the State courts have none." (R. 291). The issue here is wholly different from that in *Garmon*. Here the threshold question to be determined is the very scope and reach of the LMRA as a whole, *i.e.*, whether it applies at all to a foreign employer and his foreign employees on foreign flag ships. In *Garmon* the issue was, as between an American employer and an American union, whether particular activity was either protected or prohibited by Section 7 or Section 8 of the Act—an issue which necessarily assumes jurisdiction over the subject matter of the dispute. In *Garmon* this Court was concerned that a multiplicity of state court decisions might frustrate national policy as expressed in the Act unless the NLRB were given exclusive primary competence. It was concerned with federal-state relations. Here, on the contrary, the concern is with the projection of our federal labor law into matters that concern our relations with other sovereign nations. Finally, the issue of law here does not involve any question calling for the special competence in domestic labor matters of the NLRB. On the contrary, it involves only questions of statutory construction in accordance with applicable treaty and international maritime law.

The underlying jurisdictional question was decided by this Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957) in holding that the LMRA was not applicable to a foreign ship and its foreign crew. Such a decision would not have been rendered if the *Garmon* rule were

applicable and the jurisdictional question was for the exclusive primary competence of the NLRB, as was, in fact, urged by Mr. Justice Douglas in his dissenting opinion in *Benz*.

Petitioner submits that the *Benz* decision is controlling in the instant case. The construction of the LMRA in *Benz* reflects the legislative history which describes the Act as applying to American employers and American employees. The *Benz* decision construes the Act in harmony with the express language of the Maritime Labor Act, 52 Stat. 965 (1938) which was specifically inapplicable to foreign flag vessels. It is in accord with the established canon of construction that a statute should never be construed to apply extraterritorially absent the clearly expressed intent of Congress. See, *e.g.*, *Foley Bros. Inc.* v. *Filardo*, 336 U. S. 281 (1949). It is in accord with the venerable canon of construction that a statute should never be construed to violate the law of nations if any other possible construction exists. See, *e.g.*, *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804).

Under Article XV of the Treaty with Liberia, August 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939), as well as under undoubted international maritime law, the nationality of a vessel is determined by its flag. Furthermore, under principles of comity and international law long accepted by the United States, the law of the flag country governs exclusively (with certain exceptions not here relevant) the internal affairs of a ship. See, *e.g.*, *Wildenhus's Case*, 120 U. S. 1 (1887); *United States* v. *Flores*, 289 U. S. 137 (1933).

For the United States to project American labor laws on board foreign vessels to regulate their internal affairs including employment relationships, would cause resentment over what would be considered by the flag state to be an infringement of its sovereignty and invite retaliation by foreign nations. It would at least be an invitation for foreign nations to assert their laws over the internal affairs of American flag ships. Similarly, to establish a test, as suggested by the state court, of weighing the contacts of foreign vessels with the United States to determine whether the LMRA should apply to govern labor relations would, in addition to being impractical and unsupported by authority, invite a multiplicity of conflicting decisions by soveregn nations—each nation weighing the contacts of a particular ship with itself. The obvious confusion and resentment which would result itself sounds the warning against following such a course. As succinctly stated by this Court in *Benz*:

> "... for us to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." 353 U. S. at 147.

I. The Court of Appeals of the State of New York Erred in Applying the Rule of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245 (1959) to Deprive the State Court of Jurisdiction in the Instant Case.

The state court concluded that:

> "... it is surely 'arguable' that the board would exercise jurisdiction in the dispute as to which this injunction was ordered. We should therefore hold ... that at least until the board refuses jurisdiction the State courts have none." (R. 291)

The Court relied upon the rule of the *Garmon* decision, *supra*, that:

> "... When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S. at 245

It may be, as the court below suggested, that it is "arguable" that the Board itself would attempt to exercise jurisdiction in the dispute as to which the injunction was issued. But this is not the *Garmon* test. Under *Garmon* the question to be decided is whether, as a matter of law, the particular activities involved clearly are not or "arguably" are protected or prohibited under the Act. We show in Point II below that, under controlling decisions by this Court, the Act itself clearly does not extend to the subject matter of the controversy now before this Court. Thus, the second issue, which was dealt with in *Garmon*, as to whether particular sections of the LMRA protect or prohibit specific activity is never reached in the case at bar.

The application of the *Garmon* rule in this case to the basic issue of jurisdiction over the subject matter was, we submit, erroneous.

The *Garmon* case involved a dispute between American unions and an American employer in the business of selling lumber in California. The unions had sought an agreement with the employer to retain in his employ only workers who were already union members or who applied for membership in thirty days. The employer refused, claiming that none of the employees wanted to join the union, and that in any event he could not accept such an arrangement until one of the unions had been designated as collective bargaining agent. The union then began to picket for the purpose of compelling execution of the proposed contract.

The *Garmon* case did not involve a basic jurisdictional determination. The issue was whether or not particular activity of an American union against an American employer, both obviously within the jurisdictional scope of the LMRA, was either protected or prohibited under Sections 7 or 8 thereof. The underlying question here, on the other hand, requires not a determination of whether a particular activity falls within the protection or prohibition of a particular section of the LMRA, but rather the threshold determination as to the very scope and reach of the LMRA as a whole, *i.e.*, whether Congress intended it to apply to foreign ships at al. The employer-employee relationship is between a foreign employer and his foreign employees.

In *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), although Mr. Justice Douglas urged in his dissenting opinion that state law had been pre-empted by federal law and that "American unions should be subject

only to disciplinary action by the federal agencies to whom Congress has entrusted the job of law enforcement," 353 U. S. at 149, this Court reached and decided the question of whether the jurisdictional reach of the LMRA extends to foreign ships and their foreign crews without invoking or even discussing application of the *Garmon* rule as it had been developed up to that time in *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955) and other decisions. The *Benz* case involved review of the decision of a federal court sitting in diversity and applying state law to permit recovery of damages resulting from picketing of a foreign flag ship in an American port. That decision could not have been rendered if the pre-emption rule were applicable, for this Court would then have had to refer the controversy to the exclusive primary competence of the NLRB. This was the view urged in the dissenting opinion of Mr. Justice Douglas.

The "arguably subject" rule of *Garmon* is no more applicable to the issue in this case than it was to that in the *Benz* case.

In *Garmon* this Court weighed heavily the possibility that a multiplicity of conflicting state court decisions might interfere with and frustrate national policy as expressed in the LMRA. It was concerned with federal-state relations—the extent to which state regulation must yield to federal authority where there is the potential that state power will interfere with the "clearly indicated [federal] policy of industrial relations," 359 U. S. at 243. No such problems are raised here. Here the concern is with the projection of the LMRA into an area involving infringement of the sovereignty of foreign nations. Here too, as in the *Benz*

case, the question is raised, which did not exist in the *Garmon* decision, of whether there is any expressed Congressional policy that the LMRA should apply at all to foreign ships and their foreign crews. The question in this case is one of law, on jurisdictional facts not in dispute, as to whether the LMRA applies at all to foreign owned foreign registered ships flying foreign flags and their foreign crews serving under foreign articles entered abroad under foreign law, the ships having come temporarily into American waters.

No more than in the *Benz* case, does the issue here involve any question that calls for the expertise of the NLRB. On the contrary, as we develop in our argument below, the attempt in this case to project federal labor law and the NLRB into international matters calls for construction of the Act in accordance with the intent of Congress, applicable canons of construction, the treaty with the Republic of Liberia, the law of the flag and the jurisdiction of the flag country over the internal order of a vessel under international law, comity and the forbearance that should be observed between friendly foreign nations in maritime matters, and other points of law wholly unrelated to any expertise accorded to the NLRB.

As observed in the dissenting opinion in the Court of Appeals of the State of New York:

> "... This is clearly not a *Garmon* ... type of situation in which the courts must yield to the exclusive authority vested in the National Board over conduct arguably an unfair labor practice or protected activity under the Act. If there is 'arguability' here, it is not as to whether there was an unfair labor practice or protected activity, but rather as to the very scope and reach of the Federal statute itself. ..."

> But courts, neither state nor federal, need step aside to permit the National Labor Board to pass upon questions regarding the scope and coverage of the Act. The board has no special competence in this area, and questions concerning jurisdiction are not its exclusive concern." (R. 294, 295)

Moreover, it is unthinkable that Congress would have intended the courts to "step aside" from the determination of the very sensitive questions of law involving the applicability of the LMRA to foreign ships and the relief available to such ships from interference by American unions while the Board exhausted its procedures. The Board may refuse to assert or deny its jurisdiction. It may, as in the instant case, do nothing for almost two years.[5] It is hard to believe that the courts must suspend their judicial function over the far reaching and sensitive jurisdictional questions here involved to permit the Board to proceed or not as it may see fit. That is not the recognized relation between courts and administrative agencies, as we understand it.

A decision by this Court that Congress has not declared any national policy for the application of the LMRA to foreign vessels will leave state courts free to apply whatever state laws may be applicable to whatever controversy may arise. In the instant case, the lower state courts, until reversed by a decision of a majority of the Court of Appeals, applied state law and granted injunctive relief against the tortious activities of the defendants. If for any reason any undesirable diversity of local law should result, it is for the Congress to determine what, if any, remedy should be provided as a matter of national policy.

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[5] A charge was filed with the NLRB by respondent IMWU against petitioner and has been pending since May 13, 1960 without any action by the Office of the General Counsel (Df. Ex. A, R. 27).

II. The Labor Management Relations Act, as Amended, Does Not Apply to Regulate Labor Relations on Foreign Flag Ships.

The state court in holding that it was "arguable" that the NLRB would exercise jurisdiction and that therefore, under the *Garmon* decision, at least until the NLRB refused jurisdiction the state courts had none, did not reach the fundamental question of law as to whether the LMRA applies at all to the situation presented on the record in this case. If we are right in our contention that this was error, then the federal question of the construction of the LMRA is squarely presented, because the jurisdiction of the state court over the subject of the action is necessarily dependent upon the decision of this Court on that federal question.

It is petitioner's contention that the LMRA has no application here.

A. Application of the LMRA as a Whole Must Be Considered in This Case

Respondents seek the protection of Section 7 of the LMRA, 29 U. S. C. §157, in their efforts to organize the unlicensed seamen on the NASSAU and VICTORIA, to be recognized as the collective bargaining representative of these seamen and to bargain with the foreign employer concerning terms and conditions of employment on board these two ships. They have also invoked Section 8(a)(5) of the LMRA, 29 U. S. C. §158(a)(5) against Ineres (Df. Ex. A, R. 27: charge filed by respondent IMWU against petitioner with NLRB dated May 13, 1960). They further have contended that the allegations in petitioner's complaint charge

violations of various of the subsections of Section 8(b) of the LMRA, 29 U. S. C. §158(b).

Respondents, in effect, invoke the full scope of the LMRA, for if Sections 7 and 8 are found to be applicable it must necessarily follow that the election provisions of Section 9, 29 U. S. C. §159, the procedural and remedial provisions of Section 10, 29 U. S. C. §160, and the other interrelated provisions must likewise be applicable. The Act is "a complex and interrelated federal scheme of law, remedy, and administration," as this Court observed in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959).

The LMRA is not susceptible of dismemberment and treatment as a series of unrelated enactments because all of its provisions are directed to the attainment of its basic objectives. These are stated in Section 1 of the National Labor Relations Act, as amended by the LMRA. It is there declared

> "... to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U. S. C. §151.

It is equally clear that neither petitioner nor respondents may invoke only selected provisions of the LMRA and thus exclude others. The LMRA must be read as a whole.

and the protections and prohibitions in it with respect to shoreside picketing, for example, are inseparable from the provisions relating to elections, and all of the regulations of the rights and duties of both sides in collective bargaining, which necessarily relate directly to the internal order of a ship.

The LMRA was treated as a whole in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957) and should be so treated here.

B. The Language of the LMRA: Its Construction in the *Benz* Decision Is Controlling Here

The language of the LMRA defines the words "employer", "employee", "labor organization", "commerce", "affecting commerce" and "labor dispute" with literal universality, 29 U. S. C. §§152 (2), (3), (5), (6), (7) and (9). It contains no express words of exclusion that are relevant here. This Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), in dealing with the same Act held, without deeming it necessary to discuss the point, that this same universal language required construction and proceeded to determine the "intent of the Congress as to the coverage of the Act." *Id.* at 142.

The language of the LMRA was similarly found to require construction in *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 at 25,889, 25,890 (2nd Cir. Jan. 12, 1962), and *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 at 25,945, 25,946 (D. D. C. Jan. 18, 1962).

We submit that the decision in the *Benz* case is controlling here. This Court held, after reviewing the legislative

history of the LMRA, that "what was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." 353 U. S. at 144. This holding precludes application of the LMRA to the foreign seamen on board petitioner's foreign ships.

The facts in the present case fit squarely within the holding of the *Benz* case in every essential particular. Both cases involve foreign flag vessels manned with alien crews serving under foreign articles entered abroad. In both cases there was direct interference by American seamen's unions with the internal management and affairs of the vessels. In both cases defendants acted while the vessels were temporarily in United States ports.

Two recent decisions held that the LMRA did not apply to Honduran flag ships with foreign crews serving under foreign articles entered abroad. The vessels in these cases were owned by a Honduran corporation which was a wholly-owned subsidiary of the United Fruit Company. One case was brought in the District Court for the District of Columbia by a Honduran union seeking a preliminary injunction against the holding by the NLRB of a representation election aboard the ships. The Court, *per* Judge Holtzoff, granted the injunction, ruling that the LMRA was inapplicable to such vessels. *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 (D. D. C. Jan. 18, 1962). The other case involved the same facts except that the injunction was sought in the Southern District of New York by the Honduran corporate owner of the ships. The decision of the District Court denying the injunction was

reversed by the Second Circuit in an opinion by Judge Friendly on the ground that the LMRA did not apply to empower the NLRB to order an election on these foreign ships. *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 (2nd Cir. Jan. 12, 1962).

The foregoing construction of federal labor laws in no way limits their appropriate application in United States maritime matters. The intent of Congress that the LMRA should apply to American flag vessels wherever they may be and to their crewmen whatever their nationality is clear. This is all the proper concern of Congress in enacting labor legislation. But it is quite a different matter to attribute to Congress an intention to regulate labor relations on foreign ships in international trade. Such an attribution would fly in the face of the canon of construction stated in *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281 (1949) that:

> "*First.* The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, *Blackmer* v. *United States*, *supra*, at 437, is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case." *Id.* at 285.
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> ". . . An intention so to regulate labor conditions which are the primary concern of a foreign country

should not be attributed to Congress in the absence of a clearly expressed purpose.". *Id.* at 286.

To apply the LMRA to shipboard labor relations on foreign flag ships would require that the Act be applied extraterritorially, because the regulatory scheme of Congress surely governs shipboard labor relations, if it governs them at all, at all times and places and wherever a ship may be. There is no problem on this point as to an American flag ship, but there is as to a foreign flag ship. It would be absurd to hold that the power of the NLRB springs into existence the moment a foreign flag ship enters the territorial waters of the United States and ceases the moment such a ship departs these waters. Such a result warns against a construction of the Act that would attribute such a purpose to Congress.

This territorial canon of construction is of long standing in our law. *The Appollon*, 22 U. S. (9 Wheat.) 362, 370-72 (1824); *Brown* v. *Duchesne*, 60 U. S. (19 How.) 183, 198 (1856); *Sandberg* v. *McDonald*, 248 U. S. 185, 195 (1918); *New York Cent. R. R.* v. *Chisholm*, 268 U. S. 29, 31 (1925); *Jackson* v. *S. S. "Archimedes,"* 275 U. S. 463, 467 (1928).

Moreover, this particular canon has been consistently applied in the construction of American labor legislation. *Foley Bros., Inc.* v. *Filardo*, *supra*, involved the Eight Hour Law; *Benz* v. *Compania Naviera Hidalgo, S. A.*, *supra*; *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 at 25,890 (2nd Cir. Jan. 12, 1962) and *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas.

¶17,392 at 25,945 (D. D. C. Jan. 18, 1962) all involved the LMRA; *New York Central R. R.* v. *Chisholm*, 268 U. S. 29, 31 (1925) involved the Federal Employers Liability Act; *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir. 1951) *cert. denied*, 342 U. S. 849 (1951) and *Air Line Stewards & Stewardesses Ass'n* v. *Northwest Airlines, Inc.*, 162 F. Supp. 684 (D. Minn. 1958), *aff'd*, 267 F. 2d 170 (8th Cir. 1959), *cert. denied*, 361 U. S. 901 (1959) both involved the Railway Labor Act.

The language of the LMRA itself, though literally universal in scope, is not helpful in determining its intended jurisdictional reach. Its legislative history, however, reveals that the Act was not intended to apply beyond the territorial limits of the United States. There is not even a hint in the legislative history that the LMRA was intended to apply to foreign employees working outside the territorial limits of the United States. Its history was considered at length by this Court in *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957), which summarized its findings as follows:

> "... The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those raised here. It appears not to have even occurred to those sponsoring the bill. The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman

> Hartley, stated that 'the bill herewith reported has been formulated as a bill of rights both for *American* workingmen and for their employers.' The report declares further that because of the inadequacies of legislation 'the *American* workingman has been deprived of his dignity as an individual,' and that it is the purpose of the bill to correct these inadequacies. (Emphasis added.) H. R. Rep. No. 245, 80th Cong., 1st Sess. 4. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possession." *Id.* at 143-144.

It is clear that even Joseph Curran, then chairman of the CIO Maritime Committee, considered the LMRA as applicable only to "American workers", "American seamen" and the "American merchant marine" when he testified at the Congressional Hearings in 1947, when amendment to the National Labor Relations Act was being considered.[6]

Every reference relating to labor relations on ships in the legislative history of the Act refers to American vessels and American workers.

C. When Congress Has Legislated With Respect to Foreign Vessels Its Intention to Do So Has Been Clearly Expressed

It is noteworthy that when Congress has legislated with respect to foreign vessels it has indicated its intent that

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[6] Hearings on S. 55 and S. J. Res. 22, bills having the object of reducing industrial strife, before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pp. 1396, 1398, 1399, 1405, 1411, 1413.

legislation apply to foreign vessels and alien seamen in clear and unmistakable language. Such legislation is found in areas recognized as appropriate and customary by maritime nations. Immigration laws are, of course, applied to all vessels.[7] Customs and certain food and drug provisions apply equally to domestic and foreign vessels.[8] And Congress has demonstrated a strong interest in maintaining standards of safety on all vessels navigating waters of the United States. Examples are the Steamboat Inspection Act,[9] the Dangerous Cargo Act,[10] the Load Lines for American Vessels Act,[11] the Passenger Act[12] and a miscellany of other statutes in the same area.[13]

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[7] See for example, 66 Stat. 219 (1953), 8 U. S. C. §1281 (1958); 66 Stat. 233 (1953), 8 U. S. C. §1357(a)(3) (1958); 66 Stat. 221 (1953), 8 U. S. C. §§1283-84 (1958); 66 Stat. 195-96, 198 (1953), 8 U. S. C. §§1221-22, 1225 (1958); 66 Stat. 201 (1953), 8 U. S. C. §1227 (1958).

[8] See for example, 46 Stat. 708 (1931), as amended, 19 U. S. C. §1401(a) (1958); 46 Stat. 710-11 (1931), as amended, 19 U. S. C. §§1431, 1433, 1435 (1958); 46 Stat. 716 (1931), 19 U. S. C. §1455 (1958); 46 Stat. 747, 749 (1931), as amended, 19 U. S. C. §§1581, 1588 (1958); 38 Stat. 277 (1915), as amended, 21 U. S. C. §184 (1958).

[9] Rev. Stat. §§4399-4401 (1875), as amended, 46 U. S. C. §§361-367 (1958).

[10] Rev. Stat. §4472 (1875), as amended, 46 U. S. C. §§170-170b (1958): *United States* v. *Giordani*, 163 Fed. 772 (S. D. N. Y. 1908).

[11] 45 Stat. 1492-94 (1929), as amended, 46 U. S. C. §§85-88d (1958).

[12] 22 Stat. 186 (1883), as amended, 46 U. S. C. §§151-163 (1958).

[13] Rev. Stat. §481 (1875), 46 U. S. C. §481 (1958); 41 Stat. 998 (1921), as amended, 46 U. S. C. §882 (1958); 53 Stat. 1049 (1939), as amended, 46 U. S. C. §224-a (1958).

This Court in its opinion in the *Benz* case, 353 U. S. at 144-145, gave two examples of legislation in which the intention of Congress to apply the legislation to foreign ships in our ports was clearly expressed: the Seamen's Act, of March 4, 1915, 38 Stat. 1164, which prohibits advances of seamen's wages on foreign vessels "while in waters of the United States," construed in *Sandberg* v. *McDonald*, 248 U. S. 185 (1918); and the 1920 amendment to Section 4 of the same Act, 41 Stat. 1006, 46 U. S. C. § 597 (1958); granting to every seaman—"on foreign vessels while in harbors of the United States" the right to demand one-half of his then earned wages, construed in *Strathearn Steamship Co.* v. *Dillon*, 252 U. S. 348 (1920) and *Jackson* v. *S. S. "Archimedes,"* 275 U. S. 463 (1928).

In the sole instance in which Congress dealt with the particular problems of maritime labor relations, it denied application of the legislation—the Maritime Labor Act—to foreign flag vessels:

> "The provisions of this title shall not apply to the master or members of the crew on any vessel not documented, registered, licensed or enrolled under the laws of the United States."[14]

In this Act Congress unequivocally made the flag of the vessel the sole determining jurisdictional factor, regardless of participation in United States commerce, ownership, nationality of the crew, etc., despite the fact the Act itself is written in terms of "waterborne commerce."[15]

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[14] §1003, 52 Stat. 966 (1938).

[15] §1001, 52 Stat. 965 (1938).

There is a marked similarity between the stated policy of the Maritime Labor Act and the policy of the National Labor Relations Act as originally enacted.[16]

Both are phrased in terms of eliminating "the causes of certain substantial obstructions to the free flow of commerce," except that, as noted above, the Maritime Labor Act is written in terms of "water-borne commerce." Each Act employs the same phrase, "to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ." "Water-borne commerce" is defined in the Maritime Labor Act in broad terms, including "commerce by water between any State . . . and any foreign country," and "commerce by water on the high seas."[17]

The Maritime Labor Act was enacted in 1938.[18] The purpose of this legislation was to facilitate water-borne commerce by speedy, harmonious resolution of disputes between maritime employers and employees. Disputes embraced by the Act were those over wages, hours of employment, rules, working conditions, grievances, and interpretation of employment contracts. Specifically excluded from the ambit of the Act were unfair labor practices and questions of employee representation, reserved to the National Labor Relations Board under the National Labor Relations Act.

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[16] 49 Stat. 449, as amended, 29 U. S. C. §151 (1958).

[17] §1003, 52 Stat. 966 (1938).

[18] 52 Stat. 965 (1938), as amended, 55 Stat. 259 (1942). (This Act is no longer in effect).

The chairman of the Senate Committee expressed the concern of the legislators that the Maritime Labor Act and the National Labor Relations Act should be construed so as to be in harmony with one another:

> " 'It would be fairly inconsistent with any kind of labor policy, after we have a statute like the Labor Relations Act with regard to unfair labor practices, for us to enact anything which would be out of harmony with that statute.' "[19]

The fact that this legislation was enacted only three years after the National Labor Relations Act and was described as a supplement thereto[20] is indicative of legislative intent that the literally universal words of our general labor laws are to be construed, when sought to be applied in maritime labor matters, to apply to American flag vessels only.

Support for this construction is found in *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281 (1949). In that case, the Court refused to extend the coverage of the Eight Hour Act to employees of a government contractor working in Iran and Iraq. By its terms the Act, as amended in 1912,

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[19] Senator Thomas, Chairman of the Committee on Education and Labor, Hearings on S. 3078 before the Senate Committee on Commerce and the Senate Committee on Education and Labor, 75th Cong., 3d Sess., pt. 12 at 1181 (1938).

[20] Justice Douglas in a dissenting opinion, declared:

> "The Merchant Marine Act of 1936, . . . deals with maritime labor relations as a supplement to the National Labor Relations Act (see 46 U. S. C. §1252 [Maritime Labor Act]) . . ." *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 499 (1947) (dissenting opinion)

extended to "every contract" and thus on its face appeared to cover a contract abroad. However, this Court noted that a 1913 amendment to the Act was designed to extend to dredgers "in any river or harbor of the United States or of the District of Columbia" the same coverage accorded to "laborers and mechanics" under pre-existing law. This Court construed the 1913 amendment as a strong indication of Congressional intent to limit the entire Eight Hour Act to the territorial jurisdiction of the United States. This Court declared:

> ". . . In its attempt to secure equality of treatment for dredges on the one hand and laborers and mechanics on the other, Congress would hardly have intended for coverage over the latter class to extend to the far corners of the globe while coverage over the former was limited to work performed in rivers or harbors 'of the United States or of the District of Columbia.'" *Id.* at 287-88.

To paraphrase the language of this Court, it is hard to believe that a valid construction of these two acts of Congress would extend the National Labor Relations Act, as amended by the LMRA, to foreign flag vessels and restrict the Maritime Labor Act of 1938 to American flag vessels. Such a construction does violence to common sense and has no support in legislative history.

D. The State Court Erred in Suggesting That the Extent of the American Contacts of a Foreign Vessel Should Be the Test to Determine Applicability of the Act[21]

The state court, we submit, was in error in limiting the holding of this Court in the *Benz* decision to ships that "happened temporarily to be in American waters" (R. 288). The state court described petitioner's two ships as having "an American port as one of the two termini of its fixed, regular shuttle service" (R. 289) in contrast to the tramp ship in the *Benz* case.

We believe that the state court read the *Benz* opinion too narrowly. The fact is, of course, that great fleets of foreign vessels have, throughout our history as a great

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[21] The state court referred extensively (R. 287-291) to three NLRB cases: *West India Fruit and S.S. Co.*, 130 NLRB No. 46 (1961); *Eastern Shipping Corporation*, Case No. 12-RC-415, 44 LRRM 1571 (1959) and *Peninsular and Occidental S.S. Co.*, 120 NLRB No. 147 (1958). In the *West India* case, the Board laid down a test for determination of whether the LMRA was applicable to foreign flag shipping, namely, whether the "contacts between the operation of the *Sea Lord* [the foreign flag vessel] and the United States are substantial—that is more than minimal but not necessarily preponderant." (1961 CCH NLRB at 14,948) The Board has since *West India* applied the contacts test to all cases involving foreign ships brought before it and has in each case extended its jurisdiction over the ships involved. See *Peninsular and Occidental Steamship Co.*, 132 NLRB No. 1 (1961), *Eastern Shipping Corp.*, 132 NLRB No. 72 (1961); *United Fruit Co.*, 134 NLRB No. 25 (Nov. 17, 1961). The *West India* and *Peninsular and Occidental* cases are pending on petitions for review before the 5th Circuit. The *United Fruit* decision was in effect reversed when the Board was enjoined in two separate decisions from conducting an election on the foreign flag ships involved. *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 (D. D. C. Jan. 18, 1962) and *Empresa Hondurena de Vapor, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 (2nd Cir. Jan. 12, 1962).

maritime nation, conducted a "regular shuttle service" of passenger and freight vessels across the North Atlantic and South Atlantic and other great trade routes. We submit that the import of the decision of this Court in the *Benz* case does not mean that federal labor law is applicable to foreign ships that regularly or frequently trade in United States ports.

We submit further that the state court erred for a number of reasons in suggesting that applicability of federal labor law is to be determined by the American contacts of the ship (R. 288, 289).[22] In a maritime matter a "contacts" rule carries with it, as we develop below, an inherent invitation to conflict between sovereign nations.

First, there is nothing in the language of the LMRA to suggest let alone declare any such test of "contacts". This Court applied no such test in the *Benz* decision. It stated the question presented there to be:

> "... whether the Labor Management Relations Act of 1947 applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port." 353 U. S. at 138-139.

Second, any such construction of the LMRA would require that its limits be marked out on a case by case, ship by ship basis. It would require the courts to determine

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[22] See Comment, *The Effect of United States Labor Legislation on the Flag of Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies against Shoreside Picketing*, 69 YALE L. J. 498, esp. pp. 510, 511 (1960), cited with evident respect in *Marine Cooks and Stewards* v. *Panama S.S. Co.*, 362 U. S. 365, 372 (1960).

what "contacts" were relevant and then weigh them without any guidance whatsoever much less mandate from the Congress. This judicial task would run directly counter to the significant statement of this Court in the *Benz* decision:

> "... for us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the Courts." 353 U. S. at 147.

Third, there is no weighing of the "contacts" of an American flag ship when the jurisdiction of the Board is exercised over labor relations. The power of the Board is omnipresent wherever such ship may be and whether its contacts with this country are many or few, because it is elementary in international maritime law that the law of the flag country governs on the ships of that country.

Fourth, any weighing of "contacts" on a ship by ship or even company by company basis may prove to be wholly illusory and unrealistic because, as this Court noted in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) "... the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country." *Id.* at 581. Contacts, by the very nature of maritime commerce, are subject to frequent change in important respects according to the dictates of trade. A test such as this is unworkable in maritime commerce when we are concerned with a regulatory law prospective in nature governing the hear[illegible]

of the internal order of a ship at all times and wherever the ship may be.

Fifth, and of the utmost importance, any weighing of "contacts" in international maritime trade carries with it an invitation to conflict and retaliation between sovereign nations. Plainly what is the foreign commerce of the United States is also the foreign commerce of at least one other sovereign nation. Almost any contact in the United States has its counterpart abroad. If the courts of this country are to be free to weigh "contacts" so are the courts of other maritime nations. One may expect at the least that if this Court establishes a "contacts" test to determine the application of American domestic labor law over labor matters concerning foreign flag vessels, the courts and governments of foreign nations may well be influenced to accept such a decision as a guiding authority to establish similar tests and apply their own laws and regulations to vessels irrespective of their flag where the contacts of a vessel with a particular nation meet whatever standards such nation may establish. This might well result in assertion by foreign nations of jurisdiction over labor relations and other internal matters on American flag vessels. We submit that this approach should be rejected because, as this Court warned in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953). "if, to serve some immediate interest, the courts of each [nation] were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea." *Id.* at 581.

Sixth, the conflict of law principles applied to determine applicable tort law in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) and *Romero* v. *International Terminal Operating*

Co., 358 U. S. 354 (1959) have no application to determine whether or not the regulatory labor laws of this country are to be applied to the great fleets of foreign flag ships that regularly visit our ports. This Court did not even cite the *Lauritzen* decision in the later *Benz* case much less state and consider the factors there reviewed and deemed relevant to influence the choice of law to govern a maritime tort claim.[23] The LMRA regulates employment relationships—the most important aspect of the internal order of a ship. Tort claims under the Jones Act, 41 Stat. 1007 (1920), 28 U. S. C. §668 (1958), obviously do not affect the internal order of a ship. In *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2d Cir. 1932), *cert. denied*, 287 U. S. 642 (1932), it was expressly stated:

> ". . . [M]atters of 'internal management' are not involved in an action by a seaman to recover damages for injuries suffered through the negligence of the shipowner." *Id.* at 929.

Similarly, this Court in *Uravic* v. *F. Jarka Co.*, 282 U. S. 234 (1931), a case which held that the Jones Act was applicable to a claim by an American stevedore injured while working on a foreign flag vessel in American waters, ruled, *per* Justice Holmes,

> ". . . We see no reason for limiting the liability for torts committed there [on the foreign flag vessel], when they go beyond the scope of discipline and private matters that do not interest the territorial power." *Id.* at 240.

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[23] The factors considered in *Lauritzen* v. *Larsen*, *supra*, were (1) place of wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of contract, and (6) inaccessibility of foreign forum.

E. The Test to Be Applied Is Found in Long Standing Principles of International Law and Comity, Our Treaties With the Republic of Liberia and Other Countries and the Canon of Construction That "An Act of Congress Ought Never to Be Construed to Violate the Law of Nations, if Any Other Possible Construction Remains."

We submit, as stated above, pp. 22-27, that the decision in the *Benz* case is controlling and dispositive of the instant case. However, we state below the principles of international maritime law and comity as well as treaty provisions that support and confirm the construction of LMRA in the *Benz* decision and provide the proper test to be applied rather than the "contacts" test that the state court suggested. We believe the statement by this Court of the test to be applied is important not only in this case but in the administration of the LMRA.

When, as in this case, there is sought to be attributed to the Congress a purpose to project the national labor policy of this country and the jurisdiction of the NLRB to regulate labor relations on board ships of another country, issues of international maritime law are presented. It is elementary that the nationality of a ship is determined by its registry and flag, that all nations are required to recognize the nationality so determined and that the law of the flag country, apart from exceptions having no relevance here, governs all matters involving the internal order of the ship on the high seas and in foreign ports including the ports of this country. These propositions are confirmed by treaty. They would be violated by the construction of LMRA to apply on foreign flag ships.

We submit that the showing on this record that the two ships of petitioner are foreign flag ships is alone enough, under applicable principles of international maritime and treaty law, to defeat application of LMRA to those ships. As here and in *Benz*, the crew on the ships are aliens serving under foreign articles entered abroad. We submit that these facts are no more than attributes of foreign flag ships and that the decisive fact is foreign registry and flag.

The application of international law or the law of nations to statutory construction had its origin in our country in Chief Justice Marshall's early pronouncement in *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804), that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." This venerable rule was recently reaffirmed in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953):

> ". . . By usage as old as the Nation, such statutes [shipping laws of the United States] have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Id.* at 577.

It was specifically given weight in *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 at 25,495 (D. D. C. Jan. 18, 1962), holding the LMRA inapplicable to foreign ships.

The whole concept of statutory construction in deference to international law was well expressed in Justice Day's opinion respecting our tariff laws:

> "The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law." *MacLeod* v. *United States*, 229 U. S. 416, 434 (1913).

We submit the following propositions of international maritime law that should be recognized in the construction of the LMRA.

1. The Nationality of Petitioner's Vessels Is, by Specific Treaty Provision as Well as Under Settled International Law, Determined by Their Flag

Article XV of the treaty with Liberia provides:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."[24]

Petitioner's vessels, lawfully registered under the laws of Liberia, are, under this provision, Liberian vessels not only on the high seas but in "the territorial waters" of the United States.

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[24] Treaty of Friendship, Commerce and Navigation with the Republic of Liberia, August 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939).

The flag recognition provision of Article XV of the Liberian Treaty is declaratory of international law.[25] From the earliest times the nationality of a ship has been determined solely by the flag it flies. All other factors are irrelevant. Advisory opinion dated June 8, 1960, of the International Court of Justice in the Matter of the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 Am. Mar. Cas. 1005; *Lauritzen* v. *Larsen*, 345 U. S. 571, 584 (1953); *The Muscat Dhows Case (France* v. *Great Britain)* 1905, The Hague Court Reports 93, 96, 99 (Scott ed. 1916); McDougal, Burke & Vlasic, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 Am. J. of Int'l L. 25, 27-28, 56-60 (1960); Wilson, International Law 123 (3d ed. 1939); 1 Lauterpacht, Oppenheim's International Law, §255, §261 (8th ed. 1955); Rienow, The Test of the Nationality of a Merchant Vessel 42-49, 73-78, 79-116, 187, 214, 218-219 (1937); Higgins & Colombos, The International Law of the Sea 196 (2d rev. ed. 1952); 1 Hyde, International Law, Chiefly as Interpreted and Applied by the United States, 810, 811 (2d rev. ed. 1951); Walker, *Provisions on Companies In United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 382 (1956).

This point is believed to be so clear as to require only the above references.

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[25] Although customary reference is made to the jurisdiction of the flag, technically this is incorrect. The flag is merely prima facie evidence of nationality which actually "is determined by the state of registration; in other words by the ships documents". Starke, Introduction to International Law, 209, n. 2 (4th ed. 1958) and see Wilson, International Law, 123 (3d ed. 1939).

2. *International Maritime Law Recognizes that Jurisdiction Over the Internal Affairs of a Vessel Rests Exclusively With the Flag State*

The foregoing proposition is firmly established and accepted by American judicial decisions. It would lose all meaning if it were denied application to labor relations with the result that the varying labor laws of different nations were to be applied as a vessel touched at the ports of different nations. Such a result would mark the end of any rule of law in international maritime commerce. It is unthinkable and does not find support in any judicial decision. On the contrary, the authorities all support the proposition stated above.

The intervention of one nation's economic policy in the affairs of another nation is offensive and may breed resentment and retaliation. This Court and lower federal courts have clearly sounded the warning against construing the Labor Act to intrude into foreign ships for this very reason. See *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, 147 (1957); *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 (2nd Cir. Jan. 12, 1962); *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 44 CCH Lab. Cas. ¶17,392 (D. D. C. Jan. 18, 1962).

In *The "Scotland"*, 105 U. S. 24 (1881), this Court said:

> ". . . Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and

the power of the master to bind the ship or her owners." *Id.* at 30.

In *Wildenhus's Case*, 120 U. S. 1 (1887), it was stated:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require." *Id.* at 12.

More recently, in *United States* v. *Flores*, 289 U. S. 137 (1933), this Court cited with full approval the following, from 6 WEBSTER'S WORKS, 306, 307:

> ". . . It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law

> of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." *Id.* at 156.

The rule was also stated by Justice Brandeis in an unpublished Supreme Court opinion:

> ". . . [B]y general consent of the nations, the regulation of the rights and duties of officers and crews are, like matters of internal discipline, to be determined by the law of the country to which the vessel belongs—and not by the law of the place where she may, from time to time, happen to be. This undoubtedly is the general rule."[26]

There have been varying theories upon which this law has developed. Formerly this principle of the exclusive jurisdiction of the flag State over the internal order of its ships was based on a theory of territorial extension: "merchantmen on the high seas are in certain respects

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[26] Bickel, *"Strathcarn S.S. Co.* v. *Dillon—An Unpublished Opinion by Mr. Justice Brandeis,"* 69 HARV. L. REV. 1177, 1185 (1956). *Accord, e.g., The Belgenland,* 114 U. S. 355, 367 (1885); *Evangelinos* v. *Andreavapor Cia. Nav., S. A.*, 162 F. Supp. 520 (S. D. N. Y. 1958); *Grivas* v. *Alianza Compania Armadora, S. A.*, 150 F. Supp. 708, 711, 712 (S. D. N. Y. 1957).

treated as though they were floating parts of the territory of the State under whose flag they legitimately sail."[27] This theory of territoriality is now largely out of favor. Subjected to criticism by the leading British scholar, Professor William Hall,[28] this "fiction" has given way to a theory of jurisdiction based on practical necessity:

> "Every state has jurisdiction over ships flying its flag on the high seas; it may apply its law, civil and criminal, to all on board irrespective of their nationality. The justification of this principle is simply that some law must prevail on ships, and there is no other law to compete with that of the flag state. . . ."[29]

Higgins and Colombos well summarize this thesis of jurisdiction based on practical necessity:

> "There are sound practical reasons for the rule of subjection of ships to the laws of their State and it is unnecessary to employ the fiction of territoriality to account for it. . . . States make certain rules for providing ships with their nationality and authorizing them to fly their flags. There is therefore an intimate connection between the ship and the State whose nationality she acquires which carries with it the application to the ship of the laws of the flag-

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[27] 1 Lauterpacht, Oppenheim's International Law, §172a (8th ed. 1955).

[28] Hall, International Law, §§76-78 (Higgins 7th ed. 1917).

[29] Brierly, The Law of Nations, 238 (5th ed. 1955). *Cf.* Jessup's strong attack on the "fiction of territoriality," Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 191-92 (1927). *Cf. also* Pergler, Judicial Interpretation of International Law in the United States, 107-08 n. 34 (1928).

> State. . . . It is therefore accepted as a rule of international law that a merchant ship on the high seas is, under normal circumstances, subject only to the jurisdiction of the State whose flag she is entitled to fly."[30]

In the recent case of *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61. 44 CCH Lab. Cas. ¶17,392 (D. D. C. Jan. 18, 1962), the District Court of the District of Columbia, *per* Judge Holtzoff, recognized this rule, citing extensively from *Wildenhus's Case*, *supra*, in its decision granting an injunction against the conduct of an election by the NLRB aboard Honduran Flag ships owned by Empresa Hondurena de Vapores, S. A., a wholly owned subsidiary of United Fruit Company, for the reason that the LMRA does not confer any power on the NLRB to conduct such an election. In the related case *Empresa Hondurena de Vapores, S. A.* v. *McLeod*, No. 27314, 44 CCH Lab. Cas. ¶17,374 (2nd Cir. Jan. 12, 1962) a separate injunction against the conduct of an election by the NLRB on the same Honduran flag vessels was granted on the ground that the LMRA was inapplicable. The Circuit Court described the flag recognition clause in the Honduran treaty as the "beginning" of its investigation and noted that the case "goes far beyond the flying of the Honduran flag, important as *Lauritzen* [v. *Larsen*] teaches that to be." *Id.* at 25,892.

The practical considerations that support the exclusive jurisdiction of the flag State have special application to labor laws because labor relations necessarily involve a continuing relationship between employer, master and crew

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[30] Higgins & Colombos. THE INTERNATIONAL LAW OF THE SEA. 195 (2d rev. ed., 1952).

not only while the ship is in the ports of the world but also while it is on the high seas. The practical necessity is present wherever the ship may be, and jurisdiction over labor relations must surely be determined by a precise standard recognized by all nations. To implement a new standard of jurisdiction based on "contacts" would be to invite confusion, resentment, and probable retaliation among nations. Jurisdiction over the internal affairs of ships of all flags, including American flag ships, would then be a question for each nation to decide for itself by weighing the contacts, by whatever various and varying standards each nation might choose to establish for itself. It would be a departure from the recognized and long standing rule of flag law under which international commerce by water has been conducted ever since men have gone to sea.

We submit that our domestic labor laws are to be construed in conformity with the principles of international law stated above. This means that full effect should be given to the canon of construction stated in *The Charming Betsy*, 6 U. S. (2 Cranch) 64, 118 (1804) that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"; that a construction to extend the coverage of the LMRA to labor relations on foreign vessels would violate the principle of international maritime law that jurisdiction over the internal affairs of a vessel rests exclusively with the flag state; that no such construction is required or suggested in the legislative history and that full effect is given to the LMRA when it is applied to matters of domestic concern which in the maritime industry are labor relations on ships of the American merchant marine.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of the State of New York should be reversed and the cause remanded for further proceedings.

Dated: February 21, 1962.

Respectfully submitted,

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APPENDIX

Treaty of Friendship, Commerce and Navigation With the Republic of Liberia

August 8, 1938, 54 Stat. 1739, T.S. No. 956

(effective November 21, 1939).

Article XV.

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

Labor Management Relations Act (Taft-Hartley Act), 1947, as Amended (Title 29 U. S. C.)

Section 141.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful

procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. [June 23, 1947, c. 120 §1, 61 Stat. 136.]

Section 151.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedures of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by de-

pressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other

mutual aid or protection. [July 5, 1935, c. 372, §1, 49 Stat. 449; June 23, 1947, c. 120, Title I, §101, 61 Stat. 136]

Section 152.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

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(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

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(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. [July 5, 1935, c. 372, §2, 49 Stat. 450, June 23, 1947, c. 120, Title I, §101, 61 Stat. 137]